

No. 12,771

IN THE

United States Court of Appeals  
For the Ninth Circuit

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THELMA D. HAYES,

*Appellant,*

VS.

FIRST NATIONAL BANK OF FAIRBANKS,  
Executor of the Estate of Louis D.  
Colbert, deceased,

*Appellee.*

Appeal from the United States District Court for the  
Territory of Alaska, Fourth Division.

BRIEF FOR APPELLANT.

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**JURISDICTIONAL STATEMENT.**

Jurisdiction of the Probate Court is based upon Alaska Compiled Laws Annotated (1949), Section 52-1-1. Jurisdiction of the District Court is based upon Alaska Compiled Laws Annotated (1949), Sections 64-1-1 and 53-1-1, and 48 U. S. C. Section 101 (Territories and Insular Possessions). The U. S. Court of Appeals for the 9th Circuit has jurisdiction under the provisions of 28 U. S. C. Section 225, subdivision (a), First and Third, and subdivision (d).

**STATEMENT OF THE CASE.**

Mr. Louis D. Colbert, also more commonly known as Lou Colbert, died in the hospital at Fairbanks, Alaska, about the 25th day of May, 1947, (T.R. 179), having left three Last Wills and Testaments, the first one dated the 14th day of November, 1938, (T.R. 276); the second one dated the 22nd day of October, 1946, (T.R. 280-281), which was witnessed by two witnesses; and a third one, also dated the 22nd day of October, 1946, witnessed by three witnesses, (T.R. 278-279).

On the 23rd day of October, 1946, while the Testator, Louis D. Colbert, was in the Fairbanks General Hospital recuperating from arteriosclerosis, more commonly known as hardening of the arteries, (T.R. 194), Mr. Frank P. DeWree, as Trust Officer for the First National Bank of Fairbanks, Alaska, filed a petition for the appointment of guardian to take care, custody and management of the estate of Louis D. Colbert, an incompetent and incapable person, and the same was filed in the Probate Court for Fairbanks Precinct of the Fourth Judicial Division of the Territory of Alaska, on the same day and is known as Docket 1114. (T.R. 272 etc.)

On the 15th day of November, 1946, the U. S. Commissioner and ex-Officio Probate Judge, Eleanor M. Ely, decreed the said Louis D. Colbert to be an incompetent person and so executed a judgment on the same day, which was filed in the Probate Court on the 19th day of November, 1946, (T.R. 263). While the Testator, Mr. Colbert, had received notice of the hearing upon the petition to declare him an incompe-

tent, he was not personally present, nor was he represented by an Attorney, although Mr. Chas. J. Clasby and Mr. E. B. Collins, associated Attorneys at Law, in the City of Fairbanks had correspondence with Mr. Colbert in the hospital and had also asked for a continuance, (T.R. 267-269). Therefore, Mr. Colbert was declared incompetent *in absentia*. While it appears that the petition of the First National Bank, for the probating of the Will of Louis D. Colbert, which was executed on the 14th day of November, 1938, was not made a part of the record of the case, the Will was filed in the Probate Court for the Fairbanks Precinct, Fourth Division of the Territory of Alaska, by the First National Bank, on the 27th day of May, 1947, possibly prior to his burial, or immediately thereafter at the latest possible date, and Letters Testamentary were issued to the First National Bank of Fairbanks as Executor of said Will on the 27th day of May, 1947, (T.R. 275, 276, 277).

On the 9th day of June, 1947, Thelma G. Hayes executed her petition for the probate of the Will, which was witnessed by three witnesses, as aforesaid, and filed the same on the 11th day of June in the Probate Court for the Fourth Division of the Territory of Alaska, which is known as Case No. 1145. Thereafter the affidavits of the subscribing witnesses to the third Will, James F. Haynes, V. A. Cabbell and of the Attorney, Warren A. Taylor, who prepared the Will, filed with the petition of Thelma G. Hayes to probate, were filed in Probate Court on the 6th day of August, 1947.

On the 1st day of August, 1947, Thelma G. Hayes filed a petition to "Revoke Letters Testamentary and Grant Them to Persons Having a Prior Right", (T.R. 13-14), in contest to the Letters Testamentary which had been granted to the First National Bank of Fairbanks, Alaska, requesting revocation of Letters Testamentary, which had been previously granted to the First National Bank, and on the 18th day of August, Edward H. Strocker, President of the First National Bank, (T.R. 15-16-17), filed his Answer to the petition of Thelma G. Hayes (which incidentally was signed by Chas. J. Clasby, along with Julian A. Hurley, as Attorneys for the First National Bank, yet Chas. J. Clasby, being one of the Attorneys Louis D. Colbert had requested to represent him in a guardianship proceedings, hereinafter set forth said, "By reasons of other commitments to other clients, it is impossible to properly prepare and present a defense for said Louis D. Colbert; \* \* \*". The Affiant, from conversations with Mr. Collins and other Attorneys is silently familiar with issues of this case and from such familiarity, states that issues are such that will require considerable preparation by an Attorney in order to adequately present a defense for the said Louis D. Colbert) (T.R. 267-268-269). In said answer the First National Bank of Fairbanks, Alaska, admitted that a pretended Will had been executed by the decedent on the 22nd day of October, 1946, and that the same had been filed in the Probate Court. He also admitted that Thelma G. Hayes, the petitioner, was named as Executrix of said Will, but denied that

Thelma G. Hayes had the prior right to Letters Testamentary upon said estate and then, by way of an affirmative answer and defense, the First National Bank alleged, in substance, that for a long time prior to the pretended Will made by the Decedent, Louis D. Colbert on the 22nd day of October, 1946, that he was not of sound and disposing mind and memory and he was unable to comprehend the purpose or nature of the business that was being transacted, or the purpose or consequences of signing of a Will, and then alleged on the 23rd day of October, 1946, a petition had been filed by the First National Bank, requesting they be appointed Guardian of said Louis D. Colbert, and his property on account of him not being of sound and disposing mind and memory, and that on the 15th day of November, 1946, the First National Bank of Fairbanks was appointed and qualified as Guardian; then for a second and further defense and affirmative answer to the petition of Thelma G. Hayes, the answer alleges that the signature of Louis D. Colbert on said purported will was not the free and voluntary act and deed of the said Louis D. Colbert and the said Will was not signed by the claimed attesting witnesses at the request of the said Louis D. Colbert, or in his presence, or in the presence of each other, and then prayed that Letters Testamentary, heretofore issued to the First National Bank of Fairbanks be not revoked and Letters Testamentary be not granted to said Thelma G. Hayes, and that her petition be dismissed and that the First National Bank recover from the petitioner, Thelma G.

Hayes, its costs and disbursements and for such other relief as is just and equitable in the premises, (T.R. 15-16-17-18). The above answer was filed on the 18th day of August, 1947, and on the 1st day of October, 1947, Thelma G. Hayes, although the petition was signed, Thelma D. Hayes, but Thelma D. and Thelma G. Hayes being one and the same individual, her real name being Thelma Gregor Hayes, (T.R. 142), replied to the answer of the First National Bank by denying paragraphs I and II of the affirmative answer and defense of the First National Bank and then replied to the second and separate and affirmative defense, of the First National Bank, by denying each and every allegation contained therein and prayed for the relief demanded in her petition filed on the 11th day of June, 1947, as aforesaid, (T.R. 18-19-20). In the interim, and on the 6th day of August, 1947, the affidavit of the subscribing witnesses, James F. Haynes and V. A. Cabbell, together with the affidavit of Warren A. Taylor, Attorney at Law, who had prepared the third Will signed by Louis D. Colbert on the 22nd day of October, 1946, which had the three witnesses, filed his affidavit setting forth the fact that Louis D. Colbert was of sound and disposing mind and memory, in possession of his faculties and not acting under duress, fraud or undue influence of any person whomsoever, (T.R. 6-7). While the affidavits of James F. Haynes and V. A. Cabbell, (T.R. 10-11-12), stated that they knew the Testator, Louis D. Colbert on the 22nd day of October, 1946, (which was the day the Last Will and Testament of the decedent was

made, which was filed on the 11th day of June, 1947, (T.R. 7-8-9), and that they knew the witnesses, V. A. Cabbell, James F. Haynes and Arthur A. Benz, in whose presence the said Testator, Louis D. Colbert signed, and that he, (Testator), requested the witnesses to attest and sign the same as witnesses, and that said Arthur A. Benz, V. A. Cabbell, and James F. Haynes then and there, in the presence of the Testator and in the presence of each other subscribed as witnesses to said instrument. The affidavits also state that the Testator was over eighteen (18) years of age and was, in fact, seventy-two (72) years, or thereabouts and of sound and disposing mind, not acting under duress, menace, fraud undue influence or misrepresentation.

Based upon the foregoing resume of the Wills and the pleadings, the hearing on the petition of Thelma G. Hayes before the Hon. Clinton B. Stewart, U. S. Commissioner and ex-Officio Probate Judge, was commenced on the 16th day of June, 1950, in which hearing the Probate Court found for the First National Bank and against the said petitioner, Thelma G. Hayes, (T.R. 23).

Thereafter exceptions were taken by the said Thelma G. Hayes by and through her Attorneys, Warren A. Taylor and J. L. McCarrey, Jr., (T.R. 26), and Notice of Appeal was filed by Warren A. Taylor, one of the Attorneys for the Appellant on the 30th day of June, 1950.

Pursuant to said Notice of Appeal, the case was appealed to the U. S. District Court for the Fourth Division for the Territory of Alaska, under case No. 6515, and was set for hearing on the 5th day of September, 1950, at which time a transcript of the record, which was prepared by Charles Belida, the duly appointed Court Stenographer for the U. S. District Court for the Fourth Judicial Division of the Territory of Alaska, at Fairbanks, Alaska, who had taken the proceedings and made a transcript thereof in the Probate Court, without objection, was admitted and made a part of the hearing in the case No. 6515, as aforesaid, marked Exhibit "A", which is also sometimes known as Appellant's Exhibit "A-1", (T.R. 61), and while the Designation of Record, prepared by Warren A. Taylor, one of the Attorneys for Thelma G. Hayes, specifically requests the Clerk of the District Court for the Fourth Division of the Territory of Alaska:

"You are hereby requested to prepare, certify and transmit to the Clerk of the United States Court of Appeals for the Ninth Circuit with reference to the Notice of Appeal heretofore filed by Thelma D. Hayes in the above cause, the entire transcript of record in the above cause, prepared and transmitted as required by law and by rules of said Court", (T.R. 30),

a rather thorough check of the transcript of the record printed by Phillips & Van Orden Co., of San Francisco, California, does not disclose that the Judgment which was appealed from by Thelma G. Hayes,

in her Notice of Appeal filed on the 3rd day of November, 1950, to the Circuit Court of Appeals, was ever transmitted, although the Notice of Appeal specifically states:

“Notice is hereby given that Thelma D. Hayes hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of the above-entitled Court overruling the exceptions of the said Thelma D. Hayes to the Judgment and Findings of the Probate Court for the Territory of Alaska, Fourth Division, Fairbanks Precinct, dismissing the said Thelma D. Hayes Petition to Revoke Letters Testamentary and grant them to persons having prior right and sustaining the findings of fact, conclusions of law and judgment of said Probate Court and entered in this action on the 4th day of October, 1950, and amended on the 1st day of November, 1950”, (T.R. 29-30).

Thus, it is from the Judgment entered in case No. 6515 before the Hon. Harry E. Pratt, District Judge of the U. S. District Court for the Fourth Judicial District of the Territory of Alaska, at Fairbanks, Alaska, that the said Thelma G. Hayes is appealing her petition for the Probate of the Third Will made, but the Second one executed by Louis D. Colbert on the 22nd day of October, 1946.

### QUESTION OF LAW.

A resume of the foregoing pleadings very clearly sets forth the pertinent facts to be considered by the U. S. Court of Appeals for the Ninth Circuit, and has resolved itself into one single question and that is:

“Was the Testator, Louis D. Colbert, at the time he signed his Third Will, referred to in this case, and dated the 22nd day of October, 1946, which was witnessed by three witnesses, ‘of sufficient mind and memory to remember the natural objects of his bounty, to have in his mind his separate items of property, and to make a disposition of it according to some plan formed in his mind, which is not affected by some operating insane delusion’?”

“In Re Smith’s Estate, 200 Calif. 152, 252 Pac. 325;

Dowdey-vs-Palmer, 122 N. E. 102;

Dosenback-vs-Reidhorns Exrx., 53 S.W. 2nd, 731;

Halton’s Estate, 161 Atl. 809;

Delmar’s Will, 152 N. E. 448;

Weaver’s Estate, 211 N. W. 130;

Forsman’s Estate, 30 Pac. 2nd, 941.”

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### THE EVIDENCE.

The Testator, Louis D. Colbert, came to the Territory of Alaska some twenty or thirty years ago and engaged in mining, loaning money and allied business enterprises and was considered by all witnesses to be a very interesting, educated and “keen” man, (T.R. 100, 102, 127, 128, 237, 246). During the summer of

1946 his health began to wane and he found it difficult to take care of himself properly, in that his shoulder and legs became stiff and he found it very difficult to get around and he was developing general arteriosclerosis, (T.R. 146, 190, 191, 244, 245).

There is some doubt as to just why he went to the hospital, for Thelma G. Hayes stated that it was "at my request" that he went to the hospital and further, "I suggested that he go to the hospital and help him get better faster", (T.R. 148). While at T. R. 191, Dr. Arthur J. Schaible, the Testator's physician at that time, recommended on the 8th day of October, that since he was not doing too well and since "his odor was offensive to people in the waiting room so I recommended he go to the hospital", but be that as it may, it is undisputed by both the appellant and appellee that he entered the hospital on the 9th day of October, 1946. The appellant concedes that the appellee, through the testimony of Dr. Arthur J. Schaible, Andrew Nerland, Mike Stepovich, Julian A. Hurley and Harvey Van Hook, when the Testator first entered the hospital at Fairbanks, Alaska, that he was severely besmitten with pain and that at intervals he was plagued with a wandering of the mind which Dr. Schaible described as "well, he was disoriented. His memory was very, very poor. He—his reasoning was affected", also that he had hallucinations (T.R. 192, 210, 214, 239). However, there is no evidence of any of the witnesses that the appellee, including that of the Doctor who testified, that they saw the Testator on the 22nd day of October, 1946, or the date that

the Testator made his Third and Last Will and Testament. Even the testimony of Mr. Julian A. Hurley, who testified at (T.R. 238), that he and a Mr. Harvey Van Hook went over to visit Lou Colbert, "after the 17th of October and prior to the 23rd day of October, I don't remember the exact date, but it was between those days . . .", is placed in doubt, as that being the exact time he visited Louis D. Colbert for the reason that the man who went over with him, (and who Mr. Hurley testified went over with him, and who was later called as a witness) testified himself (T. R. 250), "yes, I was over there just two or three days after he went to the hospital. He was there and I went over to see him and you, (meaning Julian A. Hurley, who was the Attorney then asking Van Hook the questions) went with me too", (T.R. 250). Since, as aforesaid, Dr. Schaible, testifying from notes, stated that Colbert went to the hospital on the 9th (T.R. 191), Dr. Schaible's notes also disclosed that he saw the Testator on the 17th but not on the 19th; that he saw the Testator on the 20th, also on the 25th, and then corrected himself to say he did not see him on the 25th, but the Doctor definitely did not testify that he saw the Testator on the 22nd (T.R. 204). Hence, there is no evidence of any of the witnesses, including, but not limiting it to the appellee's witness, Dr. Schaible, who saw the Testator on the 22nd day of October, 1946, and since his record discloses that he did not see him on the 19th or again on the 25th, there is an insurmountable inference raised that Dr. Schaible did not see the Testator on the 22nd,

for had he done so, most certainly the appellees would have introduced those records in evidence, or at least would specifically have asked the Doctor to testify whether or not the records disclose that he saw the Testator on the 22nd day of October. Nevertheless, the appellant's witnesses, consisting of James F. Haynes (T.R. 41), Arthur A. Benz (T.R. 98, 99), Thelma G. Hayes (T.R. 166), and Warren A. Taylor (T.R. 108), all testified that they did, in the presence of one another see the Testator and, in addition thereto, the affidavit of V. A. Cabbell appears un rebutted, that he likewise saw the Testator on the 22nd day of October, 1946 and was present at the time the Testator signed the Will and was also present at the time the witnesses signed the Will, who all signed in the presence of the Testator (T.R. 11, 12). In addition thereto, it is testified by Thelma G. Hayes and corroborated by Arthur A. Benz, that nurses were present (T.R. 100, 169).

The evidence further discloses that the Testator met Thelma G. Hayes first in the year, 1937 (T.R. 142), and that from that date until the time of his death, they were very close friends and that, as a matter of fact, Mrs. Cecilia H. Gregor, Mother of Thelma G. Hayes testified that Mr. Colbert “. . . he was just like a father to her”, and further that it was more than an acquaintanceship, it was “a friendship”, (T.R. 140). Mrs. Cecilia H. Gregor further testified that she personally had known Mr. Colbert since Christmas night, 1938, (T.R. 132), and that Mr. Colbert was a very good friend of her husband (T.R.

133), and that she personally saw Mr. Colbert over at Thelma's place many times (T.R. 133); that he loaned her money (T.R. 134), and that Mr. Colbert attended the funeral of Mr. Gregor, which was on the 9th day of February, 1947 (T.R. 136).

It is of signal significance that the evidence discloses that the First National Bank of Fairbanks, Alaska, filed a petition in the Probate Court to declare the Testator incompetent on the 23rd day of October, 1946 (T.R. 272, 274), just one day after the Testator had executed his Will to Thelma G. Hayes, particularly in the light of the fact that the original Will, which the First National Bank sought to have admitted for probate on the 27th day of May, 1947 (T.R. 276-277), specifically provided, "No. 3. I do hereby nominate, constitute and appoint the First National Bank of Fairbanks, Alaska, the Executor of this, my Last Will and Testament", and further, it is noteworthy that after the Trust Officer, Frank DeWree (T.R. 220), was appointed Guardian over the property and estate of Louis D. Colbert, that neither he nor the President of the Bank, Mr. Edward H. Stroeker, went over to visit Mr. Colbert to care for his needs or to ascertain what his estate was comprised of. Conversely, it is noteworthy to find abundant evidence throughout the entire trial of the case, that Thelma G. Hayes cared for him a long time before he went to the hospital, recommended that he go to the hospital and then visited him daily after he went to the hospital and then took him into her own home and provided him with the very best accommodations one

could ask for, including good meals, up until a day or two before he died. (T.R. 148), (John Cetkovich T.R. 126-127; Arthur A. Benz T.R. 93-94). In fact, Mr. Cetkovich, at page 130 testified on re-direct examination that Mr. Colbert said "he would rather die here in this place than go over there and die." "That is the very words he spoke to me". He further testified that Mrs. Hayes had a Doctor come to his house and she wanted him to go to the hospital a couple of days before he went, but he refused to go (T.R. 130).

A letter dated the 21st day of February, 1947, from his sister, Emma Colbert, appellant's Exhibit "L" (T.R. 303), indicates that she is appreciative of what Thelma G. Hayes was doing for him, inasmuch as she states, "I am grateful for Mrs. Hayes for looking after you and want her to know how much I appreciate her efforts. I am pleased to know that she helps you to remember me."

Thus, the preponderance of the evidence conclusively proves, that the Testator and Thelma G. Hayes were the best of friends, although not of worldly or untoward personal nature, (T.R. 140) from 1937 until the time of his death, on or about the 25th day of May, 1947.

The evidence of the relationship between the Testator and the First National Bank and its officers is, that Mr. Stroeker, its President, had known the Testator for some twenty or thirty years (T.R. 230). Mr. Stroeker further testified that "Lou" made loans and

seemed to make out all right and in answer to a question, "Did he seem to be a pretty bright man?" he answered, "Yes, he was not a weak man. He was a fairly bright man." (T.R. 232), which corroborated other witnesses, as hereinbefore set forth, that Mr. Colbert was an intelligent man. There was one thing significant in the testimony of Mr. Edward H. Stroeker, and that is, he sought to belabor decedent about the fact that Lou, when he came to see him just before he went to the hospital, (T.R. 232), "did not know much about mortgages and things relative to real and chattel mortgages and insurance and things of that kind and he didn't seem to understand anything at all about it and he said, 'My Attorney knows.' I said, 'Lou, that has nothing to do with it. You should know yourself. Do you know what to do with a chattel mortgage when it becomes due and how long it takes a chattel mortgage to become due and what you should do for the renewing of it' . . ." (T.R. 232). Yet, on cross examination, when Mr. Stroeker was asked in substance, wasn't it a fact that the average layman would be declared incompetent because, "isn't it a fact that the average layman don't know anything" about the recording of chattel mortgages, and Mr. Stroeker answered, "Oh, no, he was too bright a man himself. He had known what he was doing. Mr. Colbert was no fool. When he was in his right mind he was a man of good intelligence. He wouldn't have been able to put over deals such deals as he had on the quartz claims and so on that he had unless he was a man of some intelligence. He had to know some-

thing about his business and he come from a good intelligent family.” (T.R. 234-235.) And yet, that same Bank President, that same witness who had been berating the decedent because of his purported lack of, shall we say sanity, in response to the direct question, “What is the present law. Mr. Stroeker, in regard to renewing chattel mortgages . . .” He answered, “Well, you have one year after the cancellation—one year after the due date of the chattel to renew, to take that over.” (T.R. 235) If Mr. Colbert could have been the kettle at the time he was having the so-called berated conference with Mr. Stroeker in the back of his bank and before he went to the hospital, how black must the pot, Mr. Stroeker, be when he testifies what “the present law” in regard to renewing chattel mortgages is, since a renewal of a chattel mortgage was later introduced, which heretofore belonged to Louis D. Colbert, the testator, in the year 1945, and marked Exhibit “M”, which is found at T.R. 305, which precisely, and directly, conforms to the law for the renewal of chattel mortgages by the so-called incompetent testator, Lou Colbert. Then Mr. Stroeker, sensing that possibly he may be on thin ice, totally evades the question as to whether or not he knew Mr. Colbert had ever renewed any of his chattel mortgages by stating, “Well, that doesn’t come under my—that’s his personal affairs. That isn’t my affair.” (T.R. 236) Mr. Stroeker further evades a direct answer to the question of whether or not he and Mr. Colbert had ever quarrelled, when he answers, “Oh, no. I never quarrelled with Lou at all. I never

had any occasion to quarrel with him. I very seldom quarrel with anyone at all. That isn't part of my business to quarrel with people. I think one must use a little diplomacy when they're in business." (T.R. 236) It was interesting to note that, in answer to a question as to whether or not Mr. Colbert ever asked Mr. Stroeker for the Will he had left at the bank, that Mr. Stroeker testified, "No, he didn't take that up with me. Had he done so, I would have referred him to the trust officer. That doesn't come under my department at all. That is what my trust officer is paid for, to look after those things, and I don't interfere with his business, unless he comes to me or unless I think he is doing something that is not quite right, otherwise, he uses his judgment. That's what he is paid for, for the knowledge he has in handling trust accounts and so on." (T.R. 237), which leads us up to the testimony of Mr. Frank DeWree, the trust officer of the First National Bank.

On direct examination, Mr. DeWree testified as to how long he had known Mr. Colbert, Mrs. Thelma G. Hayes, also referred to the account of Mr. Colbert during the year 1946, that he had a small bank balance of \$411.97, as of the 15th day of October. (T.R. 218) Then, surprisingly, counsel for the Appellee asked the witness whether or not he filed the petition "Asking that the bank be appointed Guardian", on the 23rd day of October, 1946, to which Mr. DeWree testified that he did, at which time he was asked, "Did you ever visit Lou over there yourself?" "No, I did not." "You did not see him yourself?" "No,

sir." ". . . And you were appointed—the bank was appointed guardian of his person and property?" "Yes, sir." (T.R. 220) Yet, this same witness, on cross examination, the evidence reveals, in response to a question, "Would you want somebody to act towards you, if you were in the same condition, as you acted towards Mr. DeWree—towards Mr. Colbert?", answered "I believe I left somebody else to look after—I think my other parties in my family would, but he didn't have any other members of his family." (T.R. 222) Further, this same trust officer, of the First National Bank, testified, Question: "Did you pay for his board any place?" "No, sir." Question: "Or see that he was well taken care of?" Answer: "No, sir." Question: "Did you go to see him when somebody else was taking care of him?" Answer: "We heard that somebody else was, yes." Question: "While you were—did you go and see him while somebody else was taking care of him?" Answer: "I didn't visit." Question: "Did you know that Thelma Gregor was taking care of Mr. Colbert?" Answer: "That is what we heard." Question: "Feeding him and giving him a place to sleep?" Answer: "He had his own home." Question: "What?" Answer: "He had his own place." Question: "Well, he had his own place? He was incompetent! Would you allow an incompetent—him as an incompetent to go and live alone at his home up on Gillam Way? You, being his guardian, would you allow him to go up and live alone?" Answer: "Isn't it all subsequent to this?" Question: "That was all after you were appointed

guardian. In other words you were his guardian of his estate and person, but it devolved upon somebody else to take care of Mr. Colbert didn't it?" Answer: "We didn't take any part in the administration. She just held right on, wouldn't let go of him, wouldn't deliver the keys to the house or nothing; wouldn't surrender anything." Question: "Well, how many times did you see Mr. Colbert after you were—the bank was appointed guardian of his estate?" Answer: "I forget." Question: "As trust officer of the bank, you looked after those particular affairs, do you not?" Answer: "Gee, I don't remember now." Question: "Did you go over to Thelma Gregor's to see Lou at any time?" Answer: "No." Question: "And after he went back to the hospital the second time, did you go over there?" Answer: "The second time? When was that?" Question: "He got out of the hospital and went back. The time he died. Did you go to see him then?" Answer: "No, I didn't see him." Question: "Were you collecting the rentals from Lou's houses at that time?" Answer: "No, we weren't." Question: "You received no money?" Answer: "I understood that she had made a lease with someone." Question: "While you were—the bank was acting guardian of the estate and person of Lou Colbert, did you collect any monies for his account, for his account?" Answer: "I would have to look at our record now. I couldn't say how much." Witness: "... I don't believe we collected anything during the guardianship, very small amount." Question: "Well, now what services did you, did the bank render then

as guardian of the estate of Lou Colbert? What did you do? You didn't look after his personal welfare. You didn't look after any of the property." Answer: "She had it all tied up." Question: "What?" Answer: "She had it all tied up already." Question: "But the important point is that you were the guardian. It was your duty to untangle it or untie it if necessary." Answer: "Well, I think the account of the report of the guardianship would show that . . ."

(T.R. 222, 223, 224, 225) Mr. DeWree, when pressed further on cross examination as to, Question: "Are you positive that you did not collect any rents on the account of the guardianship of Lou Colbert?", answered: "I am not positive. I have to refer to the records when we started collecting rents." Yet, on re-direct examination the witness was very glib to state, in answer to the question of whether or not there was any money in the bank of the guardian, "No, we had to put up some fees ourselves." Then when the trust officer was asked: "And the first money that come into the estate was that money which was paid after the building was sold and the mortgage foreclosed against Thelma Gregor, is that right?" Answer: "We received money from that and we received some rents from some cabins on Gillam Way. I forget just when that was. I think it was during the administration of the estate though." Question: "The principal property of the estate was money that was recovered on the judgments that he got on his mortgages against the property of Thelma Gregor, isn't that right?" Answer: "Yes, that's right." (T.R. 227.) And again,

in answer to a question, "As his guardian, you didn't check to see if he had money elsewhere, then?", "No, we never did." (T.R. 228.) DeWree certainly was truthful in his statements as to what the First National Bank, either as President or Mr. Frank DeWree, as trust officer, *did not do under the appointment of guardian of the estate*, for a cursory perusal of probate file 1114, which is marked Petitioner's Exhibit "A", (T.R. 91) and also (T.R. 87), which is the guardianship file, shows that the trust officer, Frank DeWree, and the present witness, nor any other officer of said bank did nothing, under the guardianship, after the judgment was signed on the 19th day of November, 1946, and an undertaking was filed on the 17th day of January, 1947, by Andrew Nerland and Davis Runyon, until an inventory was filed *on the 9th day of November, 1949*, or over two years after the testator had died and the First National Bank had been appointed guardian of the estate and property of the testator, Lou Colbert.

Referring to the testimony of Mr. Julian A. Hurley, who testified at T.R. 244, that he had done a lot of legal work for Mr. Colbert "at different times . . .", a passing salute should be given to the fact that only sixteen days prior to the time that Dr. Schaible testified that Mr. Colbert entered the hospital, October 9, 1946, (T.R. 191), Mr. Hurley prepared a contract at the request of Mr. Colbert (T.R. 274), notarized the same after Lou Colbert had signed it in the presence of other witnesses, in Mr. Hurley's office (T.R. 248), and when presented with the Agreement (T.R. 246),

which is marked Exhibit "N", (T.R. 307, etc.), in answer to the question, "Was Mr. Colbert competent on the day he signed that?", he answered, "Well, *I did not think he was incompetent at that time.*" Yet, this same witness testified, at T.R. 241, "Oh, yes. I would like to make a statement that—one more statement, pardon me. In my experience as United States Attorney in Anchorage for 2½ years and United States Attorney here for 9 years, I have had considerable experience conducting examinations before the Court in connection with persons charged with being insane and not of sound mind. From my conversation with Lou Colbert and my observation of him over there and his actions, I would say that in my opinion he wasn't of sound mind. I thought that he was just as crazy as any man I ever saw committed to the asylum."

It is revealing to note, after a thorough investigation of the Exhibits introduced either by the Appellant or the Appellee, that they sustain a continuity of competency on the part of the testator, Louis D. Colbert, from January of 1946 to May the 25th of 1947, a few of which are noted as follows, which heretofore have not been referred to in the discussion of the evidence:

Appellant's Exhibit "J", being a real mortgage from Thelma G. Hayes to L. D. Colbert, dated the 22nd day of January, 1946. (T.R. 298).

Receipt from L. D. Colbert, Appellant's Exhibit "K", which recites as follows:

“Receipt

July 6, 1946

Received from Thelma Hayes Twelve Hundred Twenty Four Dollars for payment in full with interest on Graehl Circle Bar Mortgage. \$1224.00 paid in full.

/s/ L. D. Colbert.” (T.R. 302)

Checks written by Colbert:

August 1. Pay to the order of L. D. Colbert, \$26.96 (T.R. 290)

September 7. Pay to the order of Arctic Piggly Wiggly Co. (T.R. 291)

September 24. Pay to the order of N. C. Co. \$14.39 (T.R. 292)

September 26. Pay to the order of Corner Drug Store \$1.25 (T.R. 287)

September 28. Cash \$10.00 (T.R. 287)

October 2. Pay to the order of Cash \$20.00 (T.R. 288)

October 4. Pay to the order of W. R. Tucker \$12.00 (T.R. 291)

October 10. Pay to the order of Healey River Coal Co. \$14.16 (T.R. 290)

all of the above checks being signed by L. D. Colbert.

On October 7, 1946, Louis D. Colbert executed a Power of Attorney to Thelma Hayes, Appellant's Exhibit “E” (T.R. 282-283).

October 23, L. D. Colbert wrote a letter to Fairbanks Agency Company, Appellant's Exhibit “G” (T.R. 286) as follows:

“Fairbanks, Alaska  
October 23, 1946

Fairbanks Agency Co.

Fairbanks, Alaska

Dear Sirs:

This will authorize you to allow Thelma Hayes to have access to my safe deposit box in your place of business.

Very truly yours  
/s/ L. D. Colbert.

Witnessed by:

/s/ Kenneth D. Wire,  
/s/ Arthur A. Benz.”

October 24, L. D. Colbert addressed an envelope to Collins & Clasby, Fairbanks, Alaska. (T.R. 271)

“Collins & Clasby  
Fairbanks, Alaska”

and enclosed a note to Thelma, dated the 24th day of October, 1946. (T.R. 272).

“L. D. Colbert  
Box 1356

Fairbanks Alaska

Clinic

Oct. 24, '46

Thelma

They will try me on Nov. 6, tell Mr. Clasby, and get him to take my case.

I can't phone from here. Let me hear from you.

Yours,  
LOU.”

Then, after having made a second Will, said second Will being the first Will dated the 22nd of October,

1946, but not the Will under contest, which provided among other things, “. . . provided, however, the said Thelma G. Hayes shall pay to my sister, Emma Colbert, of Indianapolis, Indiana, the sum of Twenty-five Dollars per month so long as my sister shall live, the same to be paid out of the income or principal of my estate.”, and after having interlineated the foregoing with an additional provision, after he had thought it over, see Appellant’s Exhibit “D” (T.R. 280, 281, 282), the testator then had the first Will rewritten on the 22nd day of October, 1946, after he had called his Attorney over to prepare the same (T.R. 106-107) which provides for a lump sum payment to his sister, Emma Colbert, in the sum of One Thousand Dollars, and which was signed in the presence of three witnesses. See Appellant’s Exhibit “C”, (T.R. 278, 279, 280).

Appellant’s Exhibit “L” (T.R. 303) a letter dated the 21st day of February, 1947 from the testator’s sister, Emma Colbert, which has heretofore been briefly referred to.

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#### **SPECIFICATION OF ERRORS.**

Based upon all of the evidence set forth in the transcript of the record, which included all of the exhibits of both the Appellant and of the Appellee, it is the opinion of the Appellant that the Probate Court, together with the United States District Court for the Fourth Division of the Territory of Alaska, which affirmed the findings of the Probate Court, in

Cause 6515, erred when they found that the testator, Louis D. Colbert, was not of sound and disposing mind and memory and was mentally incompetent to execute a Will on the 22nd day of October, 1946, and that the petition of the said Thelma G. Hayes should be dismissed, the reasons and the citations of law for which will appear in the argument of this brief, hereinafter set forth.

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### ARGUMENT.

THE UNITED STATES DISTRICT COURT FOR THE FOURTH DIVISION OF THE TERRITORY OF ALASKA ERRED WHEN IT FOUND AND HELD THAT THE TESTATOR, LOUIS D. COLBERT, AT THE TIME HE SIGNED HIS THIRD WILL, WHICH WAS REFERRED TO IN THIS CASE AS THE SECOND WILL DATED THE 22ND DAY OF OCTOBER, 1946, AND WHICH WAS WITNESSED BY THREE WITNESSES, WAS NOT OF SUFFICIENT MIND AND MEMORY TO REMEMBER THE NATURAL OBJECTS OF HIS BOUNTY, TO HAVE IN HIS MIND HIS SEPARATE ITEMS OF PROPERTY, AND TO MAKE A DISPOSITION OF IT ACCORDING TO SOME PLAN FORMED IN HIS MIND WHICH IS NOT AFFECTED BY SOME OPERATING INSANE DELUSION, FOR THE REASON THAT IT IS CONTRARY TO THE LAW BASED UPON THE EVIDENCE HERETOFORE SET FORTH IN THIS BRIEF.

A thorough and searching study of all of the evidence does not disclose, remotely or otherwise, that there was one witness, nor was there any documentary evidence presented by either the appellant or the appellee that disclosed, or even winked at the finding of the court that on the 22nd day of October, 1946, the testator, Louis D. Colbert, was incompetent or of unsound mind and memory that would preclude him from remembering or knowing the natural objects,

or having in his mind the separate items of his property, or making disposition of his property according to some plan formed in his mind which is not affected by some operating insane delusion (see test set forth and cases citing law on page 10 of this Brief).

The court could not find that on the 22nd day of October, 1946, or on any hour of that day, from the evidence presented by the appellees at the trial in the District Court that the testator, Louis D. Colbert, was insane, incompetent, or that any person used undue influence, coerced him or in any manner whatsoever exercised any power upon him to influence his ultimate act of signing and executing his will, since it stands un rebutted that it was he, the testator, Louis D. Colbert, who requested that the first will be prepared on the 22nd day of October, 1946; it was the testator who requested that the first will prepared on the 22nd day of October, 1946, be changed by interlineation; and it was the same said testator, Louis D. Colbert, who requested that Warren A. Taylor, an attorney admitted to the practice of law, prepare a second and subsequent will on the 22nd day of October, 1946, to conform to his reconsidered disposition of his property according to a plan formed in his mind and which carried out, as the evidence undeniably and overwhelmingly discloses, his desire to provide for the natural objects of his bounty. (T.R. 102-110).

The appellants unrefutedly proved this point, as was testified to by Warren A. Taylor, the attorney who prepared both wills, V. A. Cobbell, Arthur A. Benz and James F. Haynes, attesting witnesses, and

further corroborated by Thelma G. Hayes, who, the evidence discloses, knew nothing about the signing of the first will, which named her as beneficiary, signed on the 22nd day of October, 1946, and likewise named her as beneficiary of his second will of that date, and the one which is in contest, after he had made arrangements for a sister whom he felt should have some money. Where, oh where, within the detailed transcript and/or the Exhibits, is there one scintilla of evidence upon which the court could find that the testator, Louis D. Colbert, was unsound in his mind and memory and incompetent so as not to know the "natural objects of his bounty" on the 22nd day of October, 1946, and this the court positively had to find?

In a recent California case with facts very similar to the case at hand, that State's highest court found there was no substantial evidence to sustain the finding that the decedent was not of sound and disposing mind and memory at the time he executed the will in question. *In re Llewellyn's Estate*, 189 P.2d 822 (1948). The court states at page 833:

"Except for the hospital records, all of the testimony produced in behalf of the contestants and respondents, as hereinbefore narrated, concerned the condition of the testator before and after the actual date and time when the will was executed, and the same was admissible only in so far as it tended to show the testator's condition at the very time the will was made. As was stated by this court in *Estate of Russell*, 80 Cal.App.2d 711, 721, 182 P.2d 318, 324: 'Before a solemnly exe-

cuted will may be set aside, the claimed infirmities of mind or body must be shown to have had a direct bearing upon the testamentary act, and the evidence must establish the fact that the deceased devised or bequeathed her property in a manner which, except for the claimed infirmities, she would not have done.' ”

“Respondents urge that no determination of the testator’s mental capacity can be predicated upon what he said or did, or failed to do, on March 9 or March 12, 1945, or on any given day, or at any given hour. That he did not suffer at some particular moment a mental collapse, but rather experienced a long period of mental limitation followed by a period of some months (just prior to his entry into the hospital in early March of 1945) during which mental and physical deterioration was very definite and rapid, and that finally his condition culminated in a state of such irresponsibility that on March 9 and March 12 he did not have testamentary capacity. But this contention is in contravention of long and well established principles of law which hold that testamentary incapacity must be shown by a preponderance of the evidence to exist at the time of the execution of the will, and that any infirmities of body or mind had a direct influence upon the testamentary act . . .” At page 834.

In the case of *In re Rich’s Estate*, 169 P.2d 373 (1947), the court at page 378 states as follows:

“It is fundamental that testamentary capacity exists when the testator understands the nature and situation of his property, recalls and understands his relation to the persons who have

claims upon his bounty and whose interests are affected by the provisions of the will. Estate of Garvey, 38 Cal.App.2d 449, 457, 101 P.2d 551. We fail to find in the record herein any substantial evidence that decedent did not possess such understanding. It must be conceded that the testatrix was unquestionably in great distress and mental agony at the time she wrote her holographic will and that it was written in contemplation of self-destruction. The fact that the testatrix was a suicide was properly received in evidence as tending to establish insanity but there must be more than the mere fact of suicide to show that the insanity was so complete as to destroy testamentary capacity . . .”

See *In re Morley's Estate*, 5 P.2d 92.

Oh, yes, the appellees did their utmost, and supplied all of the evidence available to them in support of their position, in that Dr. Schaible testified: “He was a man aged and his general health was deteriorating. I had known him previously in 1945 and he was always neat in his habits and when I saw him on the 8th of October, he was very slovenly in his appearance. His bodily processes, his general everything had slowed up. I recall very distinctly that it seemed to take him forever to dress and undress. He was very unsteady. He was very unclean. His underwear was dirty. He wasn't the same. He didn't act the same as he had before. His general health—I saw all the stigma of a generalized arteriosclerosis. That's a hardening of the arteries and it's a disease that comes on with aged people and it affects different people dif-

ferently. \* \* \* I recommended—on the 8th I told him to come back the next day as I recall it, and he did come back. He wasn't doing too well and his odor was offensive to the people in the waiting room, so *I recommended that he go to the hospital.*" (T.R. 190, 191)

This same witness later testified that he did not see him on the 21st, the 22nd, the 24th or the 25th day of October, 1946 (T.R. 204), but in answer to a question propounded by Mr. Hurley on Redirect examination (T.R. 203): "Was Mr. Colbert at that time on the 17th of October and on the 22nd of October, was he of sound and disposing mind?" Answer: "No." Yet this same witness on cross examination admitted that he did not know what the law considered to be the test of mental capacity as would entitle him, in the eyes of the law, to make and publish his last will and testament, and he compared the soundness and disposing memory of a testator's mind to that of an individual who could manage his affairs, by replying to a question phrased in the above language, "Yes, I should think so." (T.R. 197)

It is the opinion of the appellant that the general rule of law which defines testamentary capacity is set out in *Wills 40 Cyc.* 1004, 1006:

"Testator must have sufficient mind and memory intelligently to understand the nature of the business in which he is engaged, to comprehend generally the nature and extent of the property which constitutes his estate, and which he intends to dispose of, and to recollect the objects of his

bounty. The testator need not have the same perfect and complete understanding and appreciation of any of these matters, in all their bearings, as a person in sound and vigorous health of mind and body would have; nor is he required to know the precise legal effect of every provision in his will. Absent-mindedness or mere intellectual feebleness does not disqualify a person to make a will, as the feeble have as much right to dispose of their property as the strong."

Upon the question of testamentary capacity, it was stated in *Re Estate of Arnold*, 16 Cal.2d 573, 585, 107 P.2d 25, 32:

"Ability to transact important business or even ordinary business is not the legal standard of testamentary capacity, though it seems to be quite generally, but mistakenly, supposed outside the ranks of the legal profession, that a capacity to transact important business is the criterion of fitness to make a valid will."

In this respect it is interesting to note the case of *In re Simmons Estate*, 151 P.2d 8 (1944). The testator in that case was a man of 81 years of age, and according to some witnesses, drank excessively. He was an illiterate and could only make his mark rather than sign his name. He, too, suffered from arteriosclerosis. Yet his physician, when called in to testify in the contest of his will, stated that "for a man of his years, testator was in as good physical condition as a man of his age could possibly be; that testator had arteriosclerosis but that such condition did not ne-

cessarily indicate a weakening of the mind.” The court in upholding the will quoted at length from *Re Estate of Johanson*, 144 P.2d 72, 76, as follows:

“The test, which is not a difficult one to meet, is that one has testamentary capacity if he is able to understand and carry in mind the nature and situation of his property and his relations to the relatives and those around him, with clear remembrance as to those in whom, and those things in which he has been mostly interested, capable of understanding the act he is doing and the relation in which he stands to the objects of his bounty . . . A more rigid test would invalidate many wills, for it is of common knowledge that the making of wills is often deferred until testator is in contemplation of impending death through old age or sickness. As a consequence, many wills are made, and validly made, by those who no longer have ability to conduct their business affairs because of loss of mental vigor or partial loss of memory. Extreme care should be exercised in applying the settled rules to the facts of a given case, as a decision at variance with those rules would set an unfortunate precedent.”

The witness, Dr. Schaible, testified in answer to the following question: “Doctor Schaible, when a man with this senile type of structure to which you referred Mr. Colbert had at this time, have periods when he would be clear and of disposing memory?” Answer: “I think so.” Question: “Is it possible?” Answer: “It is possible.” (T.R. 205)

And further, this same Dr. Schaible, when a hypothetical question was placed to him as follows: “Doc-

tor Schaible, I would like to present a hypothetical question to you. If on or about the 17th day of October, 1946——” Mr. Hurley: “What date was that?” Mr. McCarrey: “17th day of October, 1946.” (Mr. McCarrey—Continuing): “A person executed a will, executed a power of attorney to an individual; assuming further that on or about the 22nd day of October, 1946, that the same individual called his attorney and asked him to draw a will which his attorney did prepare and then, according to his direction, and then assuming a step further, that this same individual did call his attorney again and have him come back and make a correction to the original will; would a person of that mental status be competent to dispose of his property and to execute any will?” \* \* \* Witness: “Yes.” (Question by McCarrey): “What is that answer?” Answer: “This was a hypothetical question and I said ‘Yes’.” Mr. Hurley: “What do you mean by that?” Witness: “I meant a person who he said a person who desired to make a will on the 15th and called an attorney to make the will according to his instructions and then later signed it and later called him back presumably—someone who did all that I would say he is of presumably of sound and disposing mind, if he did it according to his directions.” (T.R. 202, 203)

Thus the only witness or scintilla of evidence that the appellees were able to produce or adduce at the trial was the testimony of a doctor who saw the testator last on the 20th day of October, 1946, or two days prior to the time that the will in question was

made, and we do not know what time after that the same doctor may have seen the testator, but we know that he did not see him on the 25th day of October, 1946, according to his own statement (T.R. 204), and yet this same doctor, in answer to the hypothetical question, and the question of whether or not an individual suffering from arteriosclerosis would have periods of a "clear and of disposing memory", he stated: "I think so." (T.R. 205)

Thus the court erred in finding that the testator was not of sound mind and disposing memory on the 22nd day of October, 1946, based on the testimony of the one and only witness who could talk with any degree of assurance that he had personally visited the testator near the time the testator published and declared his last will and testament, and that was two days prior to the date that said will was made and published by the testator. Obviously the court in its wisdom and discretion has the right and the power to find as it sees fit, but the court is without power and authority to go beyond the scope of the evidence and of the law, and find against the evidence and the law, for some reason not set forth in the evidence or the law. It appears to the appellant that the court in this case erred as a jury did in the case of *In re Llewellyn's Estate*, supra, where the appellate court states, at page 842:

"From a review of the entire record, we are forced to the conclusion that there is not sufficient evidence to support the verdicts and the judgment predicated thereon. As was said in the case of *In re Wilson*, 117. Cal. 262, 279, 49 P.2d 172, 177,

. \* \* \* The case presents another instance of a jury being, insensibly perhaps, carried away from the real issues legitimately before them by a notion that the will was not such as in their opinion it ought to have been, and therefore ought to be set aside.' ”

The facts of that case are so similar to the facts of the present case, that they should be set out. The testator was 78 years old at the time of his death. In 1944 his health began to fail and he was under the care of a nurse at his home until hospital space became available to him on or about the 3rd day of March, 1945. The testator suffered from hardening of the liver, gall stones and ulcers, not to mention minor related conditions. During the stay in the hospital he executed two wills, one on the 9th day of March and the other on the 12th day of March, 1945. They were identical as to disposition of his property, but he was not satisfied with the signature on the first will, so he ordered the second one prepared, leaving everything to his brother. He died in September, 1945, while in the hospital. A previous will was discovered, leaving the bulk of his estate to a niece and nephew, who contested the will of March 12, 1945. The contestants introduced evidence to the effect that the testator was senile, childish, greatly deteriorated in mind and body, and suffered from the delusion that he was on a ship crossing the ocean, or at times he imagined the bed clothes were on fire. Yet they failed to establish the fact that at the time testator executed and published his last will and testament he was not

of sound mind and disposing memory, and the court held that the evidence was not sufficient to warrant a finding that the testator was incompetent to make his will.

It is striking to note that the appellees in their Answer (T.R. 15, 16, 17) refer constantly to "a pretended will, claimed to be executed by said deceased, on the 22nd day of October, 1946. . . . Admits that said petitioner is a person named in said pretended will, claimed to have been executed on the 22nd day of October, 1946, as Executor of said pretended will of said deceased." Again in the first affirmative defense and answer and again in the second affirmative answer and defense, they state: "\* \* \* purported will . . . was not the free and voluntary act and deed of the said Louis D. Colbert, and the said will was not signed by the claimed attesting witnesses at the request of the said Louis D. Colbert, or in his presence, or in the presence of each other." Yet the same appellees did not introduce one scintilla of evidence to prove undue influence, or that the will in contest was not a will, or that the will was not signed by the testator, Louis D. Colbert, that the witnesses did not sign at the request of the testator, that the witnesses did not sign in the presence of the testator and each other. Oh, yes, on cross examination every effort was made to try to prove that the testator did not request the witnesses to sign the will, that the witnesses did not sign in the presence of the testator, or in the presence of each other, but as indefatigably as the appellees tried, they did not prove that the witnesses did

not sign at the request of the testator, or that the witnesses did not sign in the presence of the testator and one another, or that the signing was not the free and voluntary act of the testator. Why did not the appellees produce some of the nurses, or the nurse who was present during the signing of the will, as testified to by Thelma Hayes (T.R. 169) and Arthur Benz (T.R. 100)? Naturally one would assume their reply would be that the nurses were gone and were no longer there. Then, if that were the case, why did they not produce some of the Sisters from the hospital. Surely both the nurses and the Sisters would not leave in that short a period of time. Why did not the appellees produce witnesses, including, but not by way of limitation, the doctor who visited the testator on the 22nd day of October, 1946, or on the 21st day of October, or on the 23rd day of October, 1946? Isn't it a fact logical to suppose that the reason why the appellees did not produce these witnesses was because they could not find any witnesses who could testify that Louis D. Colbert was incompetent on the 22nd day of October, 1946? And yet the appellees have the burden of proof to show that the will was not the free and voluntary act of the testator, that it was a pretended will, that it was not his signature, that the testator did not request the witnesses to sign the will, that the witnesses did not sign in the presence of the testator or of one another, as is shown by the following cases:

*In re Llewellyn's Estate*, supra, at page 835: "The presumption is that a person was of 'sound mind' at the time of the execution of his will, and the burden therefore always rests upon the contestants to show affirmatively and by a preponderance of the evidence the incapacity of the testator and the further fact that except for alleged infirmities of mind or body he bequeathed his property in a manner that he otherwise would not have done.

"Giving consideration to all of the foregoing evidence introduced by contestants and respondents, we must hold that it falls far short of constituting what the law regards as a rebuttal of the presumption of testamentary capacity at the time of the execution of the will, and existence of which is destroyed only when by substantial evidence it is shown that a testator was unable to understand and carry in his mind the nature and situation of his property, his relations to his relatives and those around him, incapable of understanding the act he is performing, and the relation in which he stands to the objects of his bounty if any."

*In re Estate of Hull*, 63 Cal.App.2d ....., 146 P.2d 242, 246: "The burden was on the contestants to show undue influence and in meeting that obligation it is not sufficient for them merely to show circumstances consistent with the exercise of undue influence but before a duly and solemnly executed will can be invalidated, circumstances must be shown that are inconsistent with freedom of action on the part of the testator."

Now, there is no question but what the general law is that if the testator was insane, incompetent, or suffered from delusions at the time he executed his last will and testament, in this case on the 22nd day of October, 1946, that such insanity or incompetency or delusions must have been such as would affect the disposition of the testator's estate in order to invalidate a will.

*In re Teel's Estate*, 145 P.2d 330: "Incompetency or unsoundness of mind sufficient to void a testamentary act, must be either insanity of such broad character as to establish mental incompetence generally or some specific and narrower form of insanity under which testator is victim of some hallucination or delusion, and as to the latter, the evidence must establish that the will was the creature or product of such hallucination or delusion and that it influenced the creation and terms of the will."

*In re Johanson's Estate*, 144 P.2d 72: "Testamentary capacity is not destroyed by mere false beliefs or departure from normal thoughts or action, nor even by insane delusions that do not bear directly upon and influence the terms of the will."

*In re Llewellyn's Estate*, supra, at page 832: "In re Estate of Finkler, 3 Cal.2d 584, 594, 46 P.2d 149, 153, the court approved this statement taken from *Starkhouse v. Horton*, 15 N.J.Eq. 202: 'No judicial tribunal would be justified in deciding against the capacity of a testator upon the mere opinion of witnesses, however numerous or respectable. A man may be of unsound mind, and his whole neighborhood may declare him so; but

whether that unsoundness amounts to incapacity for a discharge of the important duty of making a final disposal of his property is a question which the court must determine upon its own responsibility.' \* \* \* The case may be summed up in the language of *In re Estate of Wright*, 7 Cal.2d 348, 356, 60 P.2d 434, 438, reading: 'Tested by the decisions of this court, the judgment is wholly without evidentiary support. There is no evidence that testator suffered from settled insanity, hallucinations or delusions. Testamentary capacity cannot be destroyed by showing a few isolated acts, foibles, idiosyncrasies, moral or mental irregularities or departures from the normal unless they bear directly upon and have influenced the testamentary act. \* \* \* The burden was upon contestant throughout the case. Taking all the evidence adduced by contestant as true, it falls far below the requirements of the law as constituting satisfactory rebuttal of the inference of testamentary capacity.' "

As the case stands on appeal, the testator, Louis D. Colbert, met Thelma G. Hayes, the prime beneficiary under his last will and testament, which is presently under contest, some time during the year 1937, and that he had been "just like a father to her." He had loaned her money, counselled her in business, been a very close friend to her mother, Cecilia H. Gregor, and to her father. As a matter of fact, the testator had attended the funeral of her father after he got out of the hospital, after he published and executed his last will, and it stands undenied that immediately upon leaving the hospital he went to see her mother,

Mrs. Cecilia H. Gregor, and then from there went to Thelma Hayes' place, where he resided until the time of his death, which was on or about the 25th day of May, 1947. Also it stands un rebutted that prior to the testator ever entering the hospital in October of 1946, the prime beneficiary had cared for him, in that she had cleaned the house, washed his dishes, helped him with his business, and was one of the individuals who recommended that he go to the hospital for his own good. Further, this same prime beneficiary was the one person who saw that he had a room by himself that had running water and toilet facilities in it, that he had good meals, that a barber came to take care of him occasionally, and that a doctor was called in to see him, all of which costs she bore herself. While on the other hand, we have the First National Bank of Fairbanks, Alaska, the appointed guardian and the executor appointed in a will made on the 14th day of November, 1938, or some eight years prior to this date, who never did a thing for his comfort, well-being or apparent interest, either of his property or his person, until after he died and was buried. And yet it was the First National Bank who was quick to cast a shadow of doubt upon a man of good reputation and well standing in the Territory of Alaska by signing a petition to declare him incompetent. It was the First National Bank which, on the 27th day of May, 1947, filed a petition to probate the estate under a last will and testament made on the 14th day of November, 1938, as aforesaid, either prior to the date of his burial or concurrently therewith. What interest did the

First National Bank of Fairbanks, Alaska, have, either as guardian or as executor, or the president, Edward H. Stroeker, or the trust officer, Frank DeWree, have in Louis D. Colbert, or his estate? (See references to Transcript in discussing Evidence.)

It cannot be said that the testator and the First National Bank were on the best of terms, even prior to his entry into the hospital. Mr. Stroeker president of the First National Bank, in answer to a question whether or not he and Mr. Colbert quarrelled, answered (T.R. 236): "I never quarrelled with Lou at all." Since the testator cannot speak for himself, we then must refer to evidence from some other source, and it is interesting to note that Mr. Stroeker testified (T.R. 231) about a conversation he had with Lou, in which Lou did not know about real or chattel mortgages or insurance, and in general gave him a lecture. Doesn't it seem possible that there must have been some misunderstanding between Mr. Stroeker and Mr. Colbert at that time, or before? Otherwise Mr. Stroeker would have no occasion to talk to Mr. Colbert, for had he been sincerely interested in Mr. Colbert, as he would now lead you to believe, by virtue of his conversation, he would have at least gone over to see Mr. Colbert while he was in the hospital, or would have seen that the trust officer would have taken time out to provide the humble needs at the hospital of the testator. It was also Mr. Stroeker who advised Mrs. Hayes that he would not cash a check, as they were starting a suit to stop that, even though she had a Power of Attorney, dated the 17th day of October,

1946, and prior to the time that the guardianship suit had even been filed. (T.R. 154). This fact was never rebutted and therefore stands uncontradicted on appeal. Mr. Stroeker likewise had the audacity to call up another place, namely, the Fairbanks Agency Company, and advised them not to let Mrs. Hayes in the (safety deposit) box. (T.R. 156, 157). Evidence of animosity between the testator and the Bank is further brought out by the testimony of Thelma Hayes (T.R. 171): "Well, he was just furious about serving incompetent papers on him while he was sick in the hospital."

Isn't it also of importance that Mr. Colbert made loans from time to time directly in competition with the Bank, since the same Mr. Stroeker, on cross examination, testified: "He would not have been able to put over such deals as he had on the quartz claims and so on unless he was a man of some intelligence", and that is corroborated by Thelma Hayes' testimony, when she stated: "Well, he used to loan lots of money to different people." (T.R. 145)

Certainly there is no doubt but what the First National Bank quarreled bitterly and gravely with Mrs. Hayes, in light of the evidence (T.R. 180, 181, 182), and for what reason, since Mr. DeWree testified himself that there was only the sum of \$388.56 as of the 27th day of June, 1946, and the statement of appellees, Exhibit No. 1 (T.R. 313) discloses that the balance was only \$411.97 as of the 15th day of October, 1946, being the date prior to the time that the testator had given his Power of Attorney to Mrs. Hayes to draw

checks on the Bank. Does it seem logical that the penurious Bank was interested in Louis D. Colbert, testator, or Thelma Hayes, or could it have been some other reason?

No doubt counsel for appellees will argue that there is some conflict as to whether or not the two wills were actually signed by the testator on the 22nd day of October, 1946 (Taylor, T.R. 106, 107, 108). That argument will carry a blank load for the reason that it was testified to by all of the witnesses, including Mr. Taylor, and corroborated by Thelma Hayes, that the testator did sign the wills, and the burden of proof is upon the appellees to show that the wills were not so signed, which they have failed to do, inasmuch as the appellant's evidence stands unrebutted and undenied.

Looking at the heirs of said testator, the only evidence we have on that point is that he at one time had one sister and one brother, and as of the 17th day of February, 1947, we are certain that he had one sister, since she wrote him a kind letter thanking Thelma Hayes in the following words: "I am grateful to Mrs. Hayes for looking after you and want her to know how much I appreciate her efforts. I am pleased to know that she helps you to remember me." Who are the natural objects of his bounty? Whom would the average testator have in his mind to be the recipient, beneficiary and devisee of his acquired worldly goods at a time such as this and under the same circumstances?

The change in the second will which the testator executed on the 22nd day of October, 1946, that provided his sister, Emma Colbert, with a lump sum payment of \$1,000.00, although she was well taken care of in her own right, as was also his brother (T.R. 150), was a natural change, since she likewise was advanced in years. Suppose Edward H. Stroecker, president of the First National Bank; Frank DeWree, trust officer of the First National Bank; James E. Barrack, a business man who was a hardware and machinery dealer; Frank Young, an old friend of Louis D. Colbert; Arthur Lutro, a miner from Ruby; Dr. Arthur John Schaible; Andrew Nerland, a businessman engaged in the paint and furniture business; Mike Stepovich, a friend of long standing of Louis D. Colbert; Harvey Van Hook, a mining man from Fairbanks; and last, but not least, Julian A. Hurley, attorney at law, who testified that on the 23rd day of September, 1946, "I did not think Louis D. Colbert was incompetent at that time," (T.R. 247) were unmarried and facing the eventuality that comes to us all, whether rich or poor, and had determined to execute their last will and testament, whom do you think they would name as the natural objects of their bounty? Might they not consider an older sister who was well taken care of first by a lump sum settlement and then an individual who had been friendly to them for at least eight long years, and who had helped them in their last hours of need? Apparently some courts hold that such a will is a natural one.

*In re Agnews Estate*, 151 P.2d 126, (1944).

True the appellant did not have any doctors or bankers testifying for her at the time of the trial. It is true that the appellant did not have all business people testifying for her and on her behalf. But a search of the law in the matter of the execution of wills fails to disclose any law from any State, or any inference that the wills of the meek and lowly have to be witnessed by doctors, attorneys or businessmen, for the general law is very specific that the ordinary formalities set up by each state need only be complied with, and that the witnesses need only be regular, normal individuals, regardless of their walks of life, as the witnesses were in this case, part of whom had never seen the other before, nor had they conversed with one another since the date and time of their presence when the will of Louis D. Colbert was signed by him and given to the attorney whom he had requested to prepare the will, where it stayed until after the demise of the testator.

Louis D. Colbert was a bright and keen man, as was undeniably proved at the trial, and because of his experience in the probate of another estate, which Mr. Hurley testified to as being the William Kelly Estate, in which Louis D. Colbert acted as administrator (T.R. 238), and in which Mr. Hurley acted as attorney, a few more details being borne out in Appellant's Exhibit F (T.R. 286), the testator not only made one will, but made two wills on the 22nd day of October, 1946, and instead of having the customary two witnesses, he specifically requested three witnesses, because he did not want the same thing to hap-

pen to him that happened to William Kelly. Appellant's Exhibit A-1 (T.R. 167). In light of the fact that the testator had three witnesses upon his will, it is the opinion of the appellant that he anticipated the very thing that happened in this case, since Thelma Hayes testified in detail about the three witnesses phase of his will at T.R. 167.

Certainly the testimony of the subscribing witnesses should be given more weight than those individuals who had seen the testator before or around, but not on the date, and the only date to be taken into consideration, the 22nd day of October, 1946, as far as this case is concerned. The witnesses attesting a will must not only witness the signing and publishing of the will by the testator but must also satisfy themselves that he is of sound and disposing mind and capable of executing a will, and hence the testimony of such subscribing witnesses is entitled to greater weight than the testimony of a witness who had no such duty to perform and particularly of witnesses who were not present at the time the will was executed and did not see testator the day of its execution. *Fortenberry v. Herrington*, 196 So. 232. *In re Miller's Estate*, 116 P.2d 526.

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### CONCLUSION.

Therefore the court erred when it found that Louis D. Colbert on the 22nd day of October, 1946, was not of sufficient mind and memory to remember the natural objects of his bounty, or to have in his mind his

separate items of property or to make a disposition of it according to some plan formed in his mind which is not affected by some operating insane delusion, inasmuch as there was no substantial evidence to support such a finding, nor was the finding in accordance with the law.

For the foregoing reasons we believe that the judgment should be reversed, and the petition for the probate of the will filed by Thelma G. Hayes in Probate Cause No. 1145 on the 9th day of June, 1947, should be allowed, and that the Letters Testamentary issued to the First National Bank of Fairbanks, Alaska, should be revoked.

Dated, Anchorage, Alaska,  
April 9, 1951.

Respectfully submitted,  
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